is in trust, simply. Thousands have been extinguished by trustees who, under Kuhn *vs.* Newman, had not a spark of interest; and consequently the money has been (if that truly declares the law,) knowingly paid to the wrong hand. But compared with the fact that, that is gravely announced as the settled law of the country, which convicts every former judge, counsel and conveyancer, of ignorance of the fundamentals of our law of real property, particular evils are insignificant.

RECENT AMERICAN DECISIONS.

In the District Court of the United States for the Wisconsin District.

HENRY C. BOWEN AND OTHERS *vs.* HENRY O. CLARK AND OTHERS.

1. Two partners cannot make an assignment of all the partnership property and effects of an insolvent firm, to a trustee with preferences, after the third partner has refused to secure any one of the creditors in preference to others, or to distinguish between them, and in his absence, not out of the country, but where he might be again consulted without unnecessary delay.
2. The third partner repudiated the assignment, and he, with the aid of his copartners and a mortgagee of a portion of his property, who was also a preferred creditor, took the assigned property from the assignee, who refused to sue at law for the property, or its value, unless indemnified against costs and expenses. *Held* that a court of equity should not entertain a bill against all the partners and the mortgagee, to restore the original property to the assignee and firm on account, at the suit of two of the preferred creditors, one of whom had been refused a preference by the non-assigning partner.
3. When the principal assigning partner was laboring under the immediate effects of intoxication, which he had just slept off, at the time of the execution of the assignment, with the full knowledge of the agent of the plaintiff who procured the assignment, and of the assignee; if the circumstance is not sufficient to fix upon the transaction the imputation of fraud, it is suspicious, and should not be favored in a court of equity
4. A mortgage of a retail store, with possession and a power of disposition reserved to the mortgagor, either in the mortgage or in any other manner, is to be considered a means of hindering or delaying creditors, and void as against executions or attachments. But a court of equity will not entertain a bill, at the suit of preference creditors under an assignment, to avoid a mortgage on this ground against the mortgagors and the mortgagee, who is also a preferred creditor equal with the plaintiffs, unless there is a deficit of assets, and payment of the debt secured by the mortgage is claimed in full.

The opinion of the court was delivered by

MILLER, J.—The bill is filed by two firms—Bowen & M'Namee, and Sachett, Belchor & Co., of New York, who are creditors of the firm of H. O. Clark & Co., which was composed of Clark, Smith, and Justin. This firm being largely indebted, on the third day of July, 1854, an assignment of their stock in trade and choses in action and effects was made to Stevens, in trust. The assignment is in the form of an indenture between Clark, Smith, and Justin, partners, under the name, style, and firm of H. O. Clark & Co., party of the first part, and Charles Stevens of the second part; and it is signed, with seals annexed, H. O. Clark, Ira Justin, A. Ryatt Smith, by H. O. Clark, his partner, H. O. Clark & Co., Charles Stevens. The trust created is to convert all the assigned property into cash; and first to pay in full the claims and demands of Miller, A. Clark, Brewster, and the two firms, complainants; and then all the remaining partnership debts, if sufficient assets, and if not, in proportion.

On the nineteenth of May, previous to the date of the assignment, Clark, Justin, and Smith, by his attorney, Clark, under their respective seals, executed to Brewster a chattel mortgage of all their stock in trade in their store in Jonesville, to secure the payment in six months of the nominal sum of $16,000, with a schedule of the goods annexed. This mortgage was to secure money loaned and to be loaned, as it might from time to time be required. The mortgage provides that, "until default be made in the payment of the aforesaid sum of money, the party of first part to remain in quiet and peaceable possession of the said goods and chattels, and in the full and free enjoyment of the same; and until such demand be made, the possession of the party of the first part shall be deemed the possession of an agent or servant, for the sole benefit and advantage of his principal, the party of the second part." Smith, intending to be absent at Washington, had given to Clark a general power of attorney to transact his business in his absence. He was at Washington when the mortgage and the assignment were executed.

In the month of June, the firm of H. O. Clark & Co. transferred

these goods and their book accounts and effects to Miller, and took his notes for the consideration; but, in a few days after, this note was received, and the property was returned to the firm. In the meantime, Gilkison, the agent of Bowen & M'Namee, in the presence of Clark, urged Smith, who was then at Jonesville, for security, which Smith declined, he not being willing to distinguish between, or give preferences to, any creditors of the firm. Clark and Justin were the active members of the firm, particularly Clark; and on Smith the credit principally depended. Clark had been drinking, for two days before the execution of the assignment, with the knowledge of the plaintiff's agent and of the assignee. And about the middle of the day, after he had slept off his intoxication, he, in their presence, examined the assignment and suggested the creditors to be preferred. He knew what he was doing, but the assignee thought he had better sign the paper before he got another drink.

Immediately after the execution of the assignment the assignee took possession; and he continued in possession—selling goods at retail and collecting debts—until the thirteenth day of August. When the assignment was executed, and the assignee was placed in possession, Brewster was absent. After Smith returned from Washington he repudiated the assignment, and gave notice of it to the assignee; and he and the other members of the firm, with Brewster (the mortgagee), demanded of the assignee, and (on the thirteenth day of August) took the assigned property from the assignee, without opposition on his part; and he refuses to bring suit for the property, or its value, without indemnity against costs and expenses. While he had the property in his possession, he realised by sales and collections, about four thousand dollars. All the remaining property embraced in the assignment was taken from the assignee: he having mixed the stock of another store with the mortgaged stock in the Jonesville store.

This suit is brought, to enjoin the several members of the firm and Brewster from using, selling, or disposing of the property embraced in the assignment; and to compel them to deliver said property to the assignee, so that he may proceed in the execution of

the trust, and to account; and that the chattel mortgage to Brewster be decreed to be fraudulent and void.

It is well understood, that a mortgage may be held to secure future advances, when this is a constituent part of the original agreement, and so recited. This mortgage did not contain such recital. What portion of the sum of sixteen thousand dollars had been advanced, or was owing, at the date of the assignment, is immaterial at this time.

By the statute law of this state, a mortgage of personal property is not valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be filed in the office of the town clerk. This mortgage was so filed. But this is a mortgage of a retail store,—the mortgagers continuing in possession, treating the property as their own, and retailing from day to day. By every sale and fresh supply the mortgaged goods changed their identity. I have no doubt that such mortgages are fraudulent as to creditors, and are void as against executions and attachments. Whether the power of disposition exists in the face of the mortgage, or is so understood, or agreed between the parties at the time the mortgage is executed, or is freely to be inferred from its provisions, it is equally void, although it may be filed with the clerk according to the statute. It is to be considered and treated as a means of hindering or delaying creditors,—*Griswold* vs. *Sheldon*, 4 Comstock, 580; *Truman* vs. *Ransom*, 4 Law Reg. (for September, 1856), 693, by the Supreme Court of Ohio; and *Jordan* vs. *Turner*, 3 Blackford, 309.

But this is not a proceeding by attachment or execution on the part of creditors claiming adversely to the assignment. These plaintiffs claim under the assignment, as preferred creditors, equally with Brewster the mortgagee. The demands of the preferred creditors are not specified in the assignment; but their whole amounts are to be first paid, or, in case of a deficit of assets, they are to be paid *pro rata*. These plaintiffs are not in a situation, at present, to contest the validity of the mortgage. Unless there be a deficit of assets, and Brewster claims payment in full, under his mortgage,

to their prejudice, the validity of the mortgage cannot be questioned by them. The repudiation of the assignment, and the reclamation of the property, with the aid of Brewster, do not enable the plaintiffs to question the validity of the mortgage of a creditor equally preferred with themselves. By unpossessing themselves of the property, these parties made themselves trustees for the creditors, and they are bound to account if the assignment is valid and effectual, and should be enforced in a court of equity.

The assignment is signed by Clark as partner of Smith; not as attorney in fact, as the mortgage is signed. The power of attorney is not referred to; and it does not appear on its face to have been intended as an authority to Clark to execute the assignment, nor was it so considered by the parties.

It is a consequence of a partnership, that each acting partner is the general agent of the firm; that is, has an implied authority to act for the firm, in all business within the scope of the business transacted by it. In all that the firm has undertaken to do, or usually does, an acting partner is identified with the company. In the case of *Rogers* vs. *Batchelor*, 12 Peters, 230, Mr. Justice Story remarks: "The implied authority of each partner to dispose of the partnership funds strictly and rightfully, extends only to the business and transactions of the partnership itself, and any disposition of these funds by any partner, beyond such purposes, is an excess of his authority as partner, and a misappropriation of those funds, for which the partner is responsible to the partnership. Whatever acts, therefore, are done by any partner in regard to partnership property, or contracts beyond the scope and objects of the partnership, must, in general, in order to bind the partnership, be derived from some further authority, express or implied; conferred upon such partner, beyond that resulting from his character as partner." One partner can, in the name of the firm, replenish the stock in trade, and even sell or dispose of it, in the usual course of the business. He can dispose of an article of the stock in trade in payment of a debt of the firm. He can mortgage the stock or dispose of a portion of it to raise funds to preserve the credit or to pay debts of the firm. In the abeence of a copartner from the country

the acting partner may assign to a trustee for certain creditors of the firm, the cargo of a certain ship, and of certain debts, to raise funds in aid of the credit of the firm, *Harrison* vs. *Sting*, 5 Cranch, 289, and under like circumstances, in the absence of one partner from the country who could not be consulted, an assignment of the whole property of the concern, by one partner, was held valid by Marshall, C. J. in *Anderson and Wilkins* vs. *Tompkins*, 1 Brock. 456. From the opinion in that case, it may be inferred that the chief justice was of the opinion that the authority of the acting partner in this respect, was unlimited, but there is no doubt that the fact of the absence of the partner in England, controlled the decision; as he remarked "It is true Murray, (the absent partner,) had a right to be consulted; had he been present he ought to have been consulted. The act ought to have been, and probably would have been a joint act, but Murray was not present, he had left the country, and could not be consulted. He had by leaving the country, confided everything which respected their joint business, to Tompkins, who was under the necessity of acting alone." In the case of *Pearpont* vs. *Graham*, 4 Wash. C. C. 132, Mr. Justice Washington remarked, that "It may admit of serious doubt, whether one partner can, without the assent of his associate, assign the whole of the partnership effects, otherwise than in the course of trade, in which the firm is engaged, in such manner as to terminate the partnership. His assignment of all the effects to trustees for the benefit of the creditors of the concern, would seem emphatically to be of this character. Such is the obvious design and such must be its necessary consequence:" and Mr. Justice Story, in his work on Partnership, §101, note, on a review of the cases, concludes, that there is no small difficulty in supporting the doctrine even under qualifications, that one partner may make a general assignment of all the partnership property.

The authority in a single partner to dispose of partnership property, is not an inseparable legal consequence of an interest in the partnership, but is an actual agency, implied from the supposed assent of the other members; an express notice, therefore, from one member of the firm, that he will not be bound by the act of another

partner puts a stop to the implied authority. See 1 Am. Leading Cases, 292, and cases cited. This agency does not exist where the partners are present, or can be consulted. In *Anderson and Wilkins* vs. *Tompkins*, it is asserted that "this power would certainly not be exercised in the presence of a partner without consulting him; and if it were so exercised slight circumstances would be sufficient to render the transaction suspicious, and perhaps to fix upon it the imputation of fraud. In this respect, every case must depend on its own circumstances." In *Deckard* vs. *Case*, 5 Watts, 22, an assignment by one partner directly to certain creditors to pay debts of the firm, after the other partner had left the country was sustained on the principle of an implied power of a partner to dispose of the whole partnership effects, as held in *Mills* vs. *Barber*, 4 Day, 428, and in *McCullough* vs. *Summerville*, 8 Leigh, 415, and other cases; but the peculiar facts of such cases were urged in support of the decision.

In *Hennessy* vs. *The Western Bank*, 6 Watts & Sergeant, 300, the same principle was maintained in the case of a general assignment, with preferences of partnership effects to trustees, executed by two of these partners, in the absence from the country of the third partner—but the absence and a power of attorney of the third party are recited as the authority under which they executed the assignment. But in the case of *Dechert* vs. *Filbert*, 3 Watts & Sergeant, 454, it is decided that one of a firm has not power to make an assignment of the effects of the partnership for the benefit of creditors, against the express dissent of his co-partner. That assignment was made after the dissolution of the partnership by advertisement, but the dissent of the non-assigning partner was the ground of the decision. See also *Kerby* vs. *Ingersoll*, 1 Harrington, 172; *Hughes* vs. *Ellison*, 5 Missouri, 463; *Drake* vs. *Rogers*, 6 Id. 317. In *Hitchcock* vs. *St. John*, 1 Hoffman, 511, the assignment was made in New York, while the absent partner was in Georgia, and it was declared void. In *Dona* vs. *Sull*, 17 Vermont, 390, the assignment was declared void, for being made by one partner, who had the superintendence and care of the business, while the other partner, who resided at a different part of the State,

was absent, and was not consulted. In *Deming* vs. *Colt*, 3 Sandford's Rep. 284, and in *Hayes* vs. *Heyer*, 2 Id. 284, assignments made by one partner without the knowledge or assent of the other partner, who was present, or might have been consulted, were adjudged void. So also in *Honens* vs. *Hussey*, 5 Paige, 30, an assignment to a trustee, for the benefit of creditors, giving preferences of the stock in trade by one partner, while the other was objecting to it, was adjudged to be fraudulent as to that partner, and void. The Chancellor expressed his satisfaction, "that such an assignment is both illegal and inequitable, and cannot be sustained." The principle upon which an assignment by one partner in payment of a partnership debt rests, is that there is an implied authority for that purpose from his co-partner, from the very nature of the contract of partnership; the payment of the company debts being always a part of the necessary business of the firm. And while either party acts fairly within the limits of such implied authority, his contracts are valid and binding on his co-partner. One member of a firm, therefore, without any express authority from the other, may discharge a partnership debt, either by the payment of money, or by the transfer to the creditor of any of the partnership effects, although there may not be sufficient left to pay an equal amount to the other creditors of the firm. But it is no part of the ordinary business of a co-partnership to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors in unequal proportions. And no such authority as that can be implied. And in *Fisher* vs. *Murray*, 3 Law Rep. (N. S.) 589, it was held, that to support an assignment of the whole of the partnership property to a trustee, for the payment of debts, by one partner, or any number short of the whole, even without preferences, it must be shown that it was made under circumstances that rendered it impossible to consult the other partners; or from their acts or declarations, either before or subsequent thereto, it must appear that it was executed with their assent, or by their authority.

The Court of Errors of New York, in the case of *Mubbett* vs. *White*, 2 Kern. 443, by a vote of five judges to two, expressed the opinion of the majority, that one partner has authority to sell and

transfer all the co-partnership effects, directly to a creditor of the firm in payment of a debt, without the knowledge or consent of his co-partner, although the latter is at the place of business of the firm, and might be consulted; and that such transfer is valid, although the firm is insolvent, and thereby one creditor acquires a preference over the other creditors of the firm. This was in fact a controversy at law between creditors of the firm; and there was evidence, although contradictory, of the subsequent assent of the non-assigning partner. That decision virtually rejects the principle of implied agency; and, in my opinion, it can only be sustained, if at all, upon the ground, which was not stated by the majority, that in a controversy at law between creditors, one creditor cannot object to the validity of such an assignment to another creditor; but that the non-assigning partner alone can make the objection. Such is the law, in case of a judgment confessed by one partner against himself and his co-partners. The judgment is valid until reversed, or set aside at the instance of the non-confessing partners; and a sale under execution issued on such a judgment will vest a good title in the purchaser of the partnership property. Nor can third persons or creditors object to such judgment or sale. *Grier* vs. *Hood*, 1 Casey Pa. Rep. 430.

From an examination of the cases, it will be found that some peculiar and controlling circumstance influenced the decision. A distinction seems to exist in some of the cases between assignments directly to creditors in discharge of debts, and assignments to trustees, giving preferences to creditors. And if such distinction really exists, then there should be a difference in the effect given to the one in a suit at law between creditors, and to the other in a case of equity, by a preferred creditor against the non assigning partner.

The property of a co-partnership, upon the insolvency of the firm, is considered in equity, as a trust fund for the payment of the partnership creditors generally; and equity should be slow to enforce an assignment at the suit of a preferred creditor. A court of equity will readily enforce the trust and grant relief in cases where the assignment is for the creditors generally, upon the favorite maxim that equality is equity. This principle of equality has always been

a favorite with a court of equity; but it has not been adopted as a principle of the common law. This inequitable principle of the common law is, however, being modified by legislation. In the two great commercial states of New York and Pennsylvania, assignments with preferences to creditors are now prohibited by statute; and no doubt the prohibition will become general. Such assignments have only been tolerated upon the principle that the owner of the property has a right to make disposition of it in payment of his debts. The courts require that all assignments should be fair, and *bona fide*, and not tainted in the smallest degree with fraud; and even then, such as give a preference to a creditor or creditors, are not favored in a court of equity.

The principle to be extracted from nearly all the decisions, appears to be this, "that as a general assignment, if it does not dissolve the partnership, at least takes away from the partners the right of disposing of the effects assigned; all the members, if they are present, have a right to be consulted upon such a step; that an assignment by one partner against the known wishes of the other, would be a fraud upon him, and invalid; and an assignment without his knowledge would be presumptively so. But if one partner has left the country, he must be considered as having vested in the other implied authority to act in all matters for the benefit of the firm; and an assignment under such circumstances, if fairly made and beneficial to the interests of the company, will be sustained." 1 Am. Lead. Cases, 444. Smith was not absent from the country; but he was at Washington, where he might have been written to or seen personally in four days, or telegraphed to in one day. Especially was this the duty of the agent of the plaintiffs, and Clark, as they had full notice from him of his objection to preferring any of the creditors of the firm. Smith's assent to the assignment was essential, under the circumstances, to its validity, as to him. If he, on his return, had acquiesced in the assignment, he would be bound by it; but on the contrary, he gave notice of his dissent to the assignee, and carried it out, with the aid of his co-partners and of the mortgagee, by regaining possession of the property. When Smith objected to giving these creditors security, in preference to others, the pro-

perty was in the possession of Miller; but the firm had then the avails of the sale to Miller, whatever they were. The return of the property, by Miller to the firm, does not vary the matter in the least, or justify the presumption that Smith had come to any different conclusion upon the subject of a preference.

The assignment is valid as to Justin; and Clark's intoxication is not established by the proof to an extent that should authorize the court to pronounce the assignment void as to him. When he executed the assignment he knew what he was doing; he was not deprived of his reason and understanding. "Courts of equity, as a matter of public policy, do not incline on the one hand, to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed, merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or some imposition practiced." 1 Story's Eq. Jur., § 231.

It is not satisfactorily proven that imposition was practiced upon Clark by the plaintiff's agent, who procured the assignment; but he and the assignee had full knowledge of Clark's intoxication while the assignment was being written; and that he was laboring under its immediate effects at the time of its execution. They knew that Clark was acting in the matter for Smith, as well as for himself; and with a due regard to the interests of Smith, they should have postponed the execution of the assignment until it could be done with care and deliberation, by a sober man. If this circumstance is not sufficient to fix upon the transaction the imputation of fraud, it is suspicious, and should not be favored in a court of equity.

My opinion is, that the complainants have not a proper case for equitable interposition by this court, and that the bill should be dismissed.

In the Supreme Court of Indiana, November Term, 1856.

THE MADISON AND INDIANAPOLIS RAILROAD COMPANY *vs.* WHITENECK.

1. The right of trial by jury may be waived, and such waiver will be valid.
2. The fundamental principles of civil government discussed, and authorities cited.
3. The courts cannot annul an act of the legislature simply because it violates the fundamental principles of *correct* legislation, but may because it violates the fundamental principles of the Constitution.
4. A law may be constitutional in part, and unconstitutional in part, hence, a law which enacts that railroads shall fence, as to that provision is a reasonable regulation, but where it inflicts a penalty upon an appeal, it is unconstitutional and void.

The opinion of the court was delivered by

PERKINS, J.—Suit commenced before a Justice of the Peace to recover the value of a heifer killed by a locomotive on the Madison and Indianapolis Railroad. Recovery before the justice, and appeal to the Common Pleas. In that court, the defendant not appearing, judgment was rendered for plaintiff without the intervention of a jury, for double the amount of the judgment before the justice, &c.

A point is made which may be briefly disposed of before entering upon the main questions in the cause.

It is said, a jury should have been called to assess the damages, notwithstanding the failure of the defendant to appear, as the case stood upon the general issue.

The constitution of our State does not say that trials shall be by jury. It says the "right of trial by jury shall remain," &c. If a party voluntarily abstains from claiming the right in a given case, we think it may be judicially held that it is waived. Hence, the statute enacting that such act shall be regarded as a waiver is valid. 2 R. S. 115.

The suit was instituted under the act of March 1st, 1853, Laws of 1853, p. 113, relative to compensation for animals killed or injured by railroad machinery; and as the act is short and gives

rise to several somewhat weighty questions now to be considered, we insert it, except the repealing section, in this opinion. It follows:

"An Act to provide compensation to the owners of animals killed or injured by the cars, locomotives or other carriages of any railroad company in this State. Approved March 1, 1853.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That whenever any animal or animals shall be killed or injured by the cars or locomotives or other carriages used on any railroad in this State, the owner thereof may go before some justice of the peace of the county in which such injury occurred, and file his complaint in writing, and such justice shall fix a day to hear said complaint, and shall cause at least ten days' notice to be served on the railroad company defendant, by service of summons by copy on any conductor of any train passing through said county.

SECT. 2. On the hearing of said cause, the justice or jury trying the same shall give judgment for the plaintiff for the value of the animal destroyed or injury inflicted without regard to the question whether such injury or destruction was the result of willful misconduct or negligence, or the result of unavoidable accident.

SECT. 3. If the defendant shall appeal from such judgment, and shall not reduce the damages assessed twenty per cent., the appellate court shall give judgment for double the amount of damages assessed in such appellate court, and a docket fee of five dollars.

SECT. 4. This act shall not apply to any railroad securely fenced in, and such fence properly maintained by such company."

It is contended that this act is unconstitutional—

1. Because the object of it is not indicated in its title. It is claimed to be, in fact, an act to compel railroads to fence in their tracks, and to inflict penalties on the exercise of the right of appeal.

2. Because it is a special act. And,

3. Because it violates private right.

It is further insisted that its third section is unconstitutional, because it impairs the right of appeal.

1. We do not think the whole act void for inconsistency with its title. Its immediate purpose is there expressed. The act contains an exception as to railroads that are fenced; but we think the exception so properly connected with the subject matter of the act designated in the title, as rightly to appear in it under that title.

2. We do not think the act void simply because it is special. There is no provision of the constitution prohibiting, in terms, special legislation on the subject of railroads; and, from the peculiar character of the subject, we cannot say such legislation may not be proper. Special subjects may require some special legislation; and when it takes place, it will be for the court to judge, as in the Clay county case and the Lafayette murder cases, under section 23 of article 4, of the constitution, whether more general legislation could reasonably have been made applicable; 5 Ind., 4 and 7 Ind. 326; and also whether such special legislation conflicts with any other constitutional provision.

3. The act is alleged to infringe private right and principles of natural justice, because it makes requirements of railroad companies beyond those contained in the laws under which they are organized, and unwarrantably interferes with the prosecution of business pursuits; and it is insisted that the legislature cannot thus act for want of authority.

This objection brings up to some extent, the general question of the power of the legislature over the various pursuits of the people of the State, in other words, of legislative power; and we propose to avail ourself of the occasion to express somewhat at length our views upon it. What, then, is the legislative power of this State? The answer to this question must be drawn from an examination of the constitution. Turning to it we find article 3 to provide that the powers of government shall be divided between three departments, and section 1, of article 4, to declare that, "The legislative authority of the State shall be vested in the General Assembly."

But so far, these sections, it will be observed, do not define that legislative authority; they simply ordain a division of powers and designate the department in which the legislative, whatever it may be, shall be lodged. The distribution of the powers of government,

as a distinctive feature in their creation, among different departments, is a comparatively modern idea, suggested by the accidental development, in that form, to a great extent, of the British government, and probably first, formally enunciated to the world as an invaluable precept in the science of politics, by the celebrated Montesquieu, of Bordeaux, in France, in his Spirit of Laws, published about the middle of the 18th century. Such division, therefore, does not necessarily follow upon the simple organization of a government. Hence it became imperative, in order to insure a distribution of powers in the government of this State, to provide for it in the organization. Madison, in No. 47 of the Federalist.

The legislative power, then, being as yet simply located, the inquiry still occurs, what, how great, is that power? Is it unlimited? This question has been much discussed of late, in several cases, and deserves most careful consideration in its final determination. It has been asserted by some that "the legitimacy of all laws originates, not in the will of him or them who make the laws, whoever they may be, but in the uniformity of the laws themselves to truth, reason, and justice,—which constitute the true law."—Guizot on Rep. Government, pp. 204, 217. And if we add the further proposition of some religious, moral, and political philosophers, that it is the right of every man to judge of this conformity to justice of each law, and to obey or disobey it accordingly, we have complete, what is called in this day, the "higher law" doctrine; a doctrine consistent with the individual independence of man, but utterly inconsistent with, and impracticable in, orderly government.

In such a government the legitimacy of laws must rest in the will of the law-making power. It must be so, or government is nothing. Still, there are subjects and matters in relation to which no government should assume to control the will or action of any individual. This we shall make appear in the course of this opinion. Hence, the law-making power should be limited. Yet, from its very nature, it would seem that, practically, limits could scarcely be set to its exercise except by written constitutions; nor by these, without the existence of a power to annul laws enacted outside of the limits established; and, historically considered, we do not find that it had

been thus limited prior to the formation of the American States. True, Great Britain had, before that time, her Magna Charta and Petition of Right, but they were not ordained by the people in their sovereign capacity, and were not, in fact, paramount to acts of Parliament, however much deference might, under ordinary circumstances, be paid to them. Parliament remained, in reality, omnipotent. No power tested its enactments by a constitution.

Nor would the legislative power necessarily be limited by a written constitution. That might simply provide for a government, without any restriction upon its power, or it might expressly confer unlimited power. In either of these cases its power would, doubtless, be absolute; if not morally, at least practically.

But a constitution might limit the legislative power. It might do this either by specifying the cases in which alone the power should be exerted, or it might confer the power generally, subject to certain limitations, in which even the power would remain indefinite, unlimited wherever limitations did not operate. This latter is the case of the constitution of Indiana. Our legislature is not by abstract moral right, but in actual fact, absolute, where not restrained by that instrument. *Doe* vs. *Douglass*, 8 Blackford, 10.

The legislative power in this State, where the constitution imposes no limits, must be practically absolute whether it operate according to natural justice, or not, in any particular case, for when a law is created by the legislature, the executive must enforce it, and is vested with control of the military power of the State to enable him to do it; and, aside from the physical power of the united people of the State, there is no power to arrest the execution except the judiciary, and that department can only do it when the law conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. *Herman* vs. *The State*, 4 Am. L. Reg. 344. *Beebee* vs. *The State*, 5 Ind. 501.

The great point of difficulty here, therefore, must ever arise in determining the meaning, the extent of operation of the declaratory and expressly restrictive provisions of the organic law—the reservations in the bill of rights—in short, the implications of the consti-

tion. Such it was in the case of Beebee, supra. May the judiciary pronounce a law void because of repugnance to the fundamental principles of the government declared in the constitution as being prohibited by implication, though not in express words? Or because of repugnance to the clear scope and intention, the spirit of express restrictions as being impliedly embraced by them? These are now the questions. For example, the first section of the article of the "Bill of Rights," declares that all men are endowed with unalienable rights, among which are life, liberty, &c. Now, how broad a meaning is to be given to this section? With what view or object was it inserted in the constitution? What should be its interpretation? We shall enter upon no discussion of man's power of alienation, and no criticism of the word "unalienable." See Lieber vol. 1, p. 218. We shall not insist upon the philological accuracy of its use. We shall not dispute but that primordial or imprescriptible or unalienated might have been better used. We shall only endeavor to ascertain the meaning with which the term "unalienable" was used. And if, to express that certain rights had not been alienated, and ought not to be, a term was used which meant that they could not be, it does not weaken the force or clearness of intention in the expression.

We proceed, then, to the work of interpretation. In *Prigg* vs. *Pennsylvania*, 16 Pet. on page 610, it is said that "perhaps the safest rule of interpretation (of the constitution) after all will be found to be, to look to the nature and object of the particular powers, duties and rights, with all the light and aids of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as will fairly secure and obtain the end proposed." To the same effect, *Martin* vs. *Hunter*, 3 Cond. Rep. on p. 557; 1 Kent, 448; Federalist, No. 78; Smith on Statutes, p. 418, Sec. 276. Guided by this rule, let us proceed to seek the true interpretation of the first section of the Bill of Rights above quoted. We examine it in the light of contemporary history.

The monarchies of Europe were formerly, if they are not now, administrated upon the principle that the people were utterly destitute of all rights, and entirely at the mercy of government. In the

17th century the principle was not only thus acted upon, but it was maintained in formal treatises as being in accordance with the will of God. The tyranny exercised upon the people, under this doctrine, roused attention, excited inquiry as to, and led to the denial of, its soundness. Men, with minds liberalized, enlightened, and invigorated by the perusal of recovered ancient learning, and hearts warmed by the eloquence of ancient freedom, entered upon the study of the science of the rights of man, and arrived at the conclusion that he was possessed of such by nature which it was tyranny in government to invade. Such statesmen and scholars as Buchanan, Harrington, Milton, Sidney, Fletcher, Vane, and others, perhaps their equals, among whom it is not improper to include the illustrious and excellent William Penn, ably answered the writings of Filmer and other advocates of despotic power. The controversy waxed warm and spread widely. It enlisted the nation. It came with the colonists to America, and was prolonged. Great Britain practiced upon her maxims of absolutism in governing here, disregarding the rights of person and property. The people denied the justice of her administration, and made a question upon their natural rights. Histories of the Revolution, *passim*. The discussion of the question extended to France, and there, as it had done in England and in America, produced a revolution. The French convention, pursuant to suggestion of Lafayette, 3 Mod. Europe, 186, Mack's Life of Lafayette, 219, declared:

"The end of all political associations is the preservation of the natural and imprescriptible rights of man; and these rights are liberty, property, security, and resistence of oppression." 2 Paine's Pol. Works, 112. And, per Lafayette, in that convention: "Every man is born with rights inalienable and imprescriptible; such are the liberty of his opinions, the care of his honor and his life, the right of property, the uncontrollable disposal of his person, his industry and all his faculties; the communication of all his thoughts by all possible means; the pursuit of happinesss and the resistance of oppression."

"The exercise of natural rights has no limits, but such as will insure their enjoyment to other members of society." Mack,

supra. And see the same in Cutter's, and in Headley's Life of Lafayette. This declaration, Burke, who, alarmed at innovation, had abandoned liberal principles, undertook, in his "Reflections," &c., to refute; and, as to the British nation, contended that if its people ever had any rights, they had formally alienated them, made "as solemn a renunciation of them as could be made," by a declaration to King William, on his accession to the throne, that: "The Lords spiritual and temporal, and Commons, do, in the name of all the people aforesaid, most humbly and faithfully submit *themselves, their heirs and posterities forever,*" &c. 1 Burke's Works, Dearb. Lib. Ed., on p. 463.

These reflections of Burke drew forth replies—among them, Paine's Rights of Man, and Sir James Mackintosh's powerful "Defence of the French Revolution," in which he vindicates the declaration of man's natural rights, and proves the unsoundness of Burke's doctrine. "This doctrine," says he, "thus false in its principles, absurd in its conclusions, and contradicted by the avowed sense of mankind, is, lastly, even abandoned by Mr. Burke himself. He is betrayed into a confession directly repugnant to his general principle, viz: Whatever each man can do without trespassing on others, he has a right to do for himself," &c.

Again: "The existence and perfection of these rights being proved, the first duty of law-givers and magistrates is to assert and protect them. The moment that the slightest infraction of these rights is permitted through motives of convenience, the bulwark of all up-right politics is lost. If a small convenience will justify a little infraction, a greater will expiate a bolder violation; the Rubicon is past." Mackintosh's Miscel. Works, pp. 590, 591, 592. Pending this great discussion the people of the United States came to a decision upon the question in controversy and thus declared it. "We hold these truths to be self-evident—that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men," &c. Dec. of Independence. This declaration was framed and adopted by men of no mean judgment and who under-

stood and weighed the language used. The States severally, most of them, proceeded to ordain constitutions of government in which they said; for example, as in that of Pennsylvania:

"That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare:

"That all men are born equally free and independent, and have certain independent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing happiness." And they declared that everything in the Bill of Rights was excepted out of the general powers of government, and to forever remain inviolate.

In the constitution of Delaware, thus:

"Through divine goodness, all men have by nature the right of worshiping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and, in general, of attaining objects suitable to their condition, without injury one to another; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them," &c. *Accord*, Kentucky, Ohio, Indiana, in 1816, and other States. Connecticut in 1818, till which time she had lived under her colonial charter, and Rhode Island, who had thus lived till 1843, when she also formed a constitution. Placing ourselves thus amid the circumstances in which the framers of our early State constitutions stood at their formation, and from thence interpreting them, and ours as a substantial copy, what force should be conceded to the first article of the Bill of Rights which we have quoted? The purpose for which it was intended appears to be plain enough, and also the great importance attached to it. The monarchies of Europe maintained the doctrine that the people had no natural rights, and hence, might rightfully be controlled at will and without limit by the government. The people in this country denied the doctrine and determined to emancipate themselves from it.

The governments of Europe practiced upon their principles and disregarded all rights in the people in administration. They regu-

lated everything by law, even, on occasions, "the subsistence of the people." The hand of authority was seen in everything, and in every place." They were actuated by "a restless desire of governing too much." Burke, supra, vol. 2, p. 192; and see Stevens' Lectures on France, p. 17.

These abuses, oppressions, the people of this country determined to prohibit here; they determined to be, in the language of some of the constitutions, secure from their exercise upon themselves or their posterity. That security they designed should be perpetuated by their constitutions, and particularly by the clause in question.

In the great discussion of which we have spoken above, a proposition had been submitted, for the first time in the history of the world, thinks Mr. Sparks, by Sir Henry Vane, that "restraint be laid upon the Supreme power as a FUNDAMENTAL CONSTITUTION," that it might be "bound up" so that "this great blessing (of freedom of conscience) will hereby be so well provided for, that we shall have no causeto fear." Sparks' Am. Biography, vol. 4, pp. 262, 263.

Such was the object and intention of the framers of our constitution, in regard to natural rights. They designed the first section of it as a fundamental provision, binding up the supreme power. It was necessarily general. They could not look down the stream of time and see all the cases wherein it would be proper for a State government to exert legislative power, specify them and exclude all others, thus protecting the rights reserved; nor could they anticipate all the various attempts that might be made to invade these rights, and expressly prohibit them. They did specially prohibit such as they had experienced. But naming such attempts did not exclude the prohibition of others by the general fundamental provision. *The State* vs. *Barbee*, 3 Ind. 258; *Thomas* vs. *The Board, &c.*, 5 Ind. 4. Further, we may say that these restraints were intended to operate upon the legislative power, though we suppose that this will not be denied. Parliament had most severely outraged the rights of America. The colonists "knew it to be their most dangerous enemy." 6 Bancroft, 138. It had enacted laws prohibiting certain pursuits in America. 1 Botta's Hist. 25, 26.

The judges of England, in answer to a question by Cromwell, Earl of Essex, had reluctantly said, that if parliament should condemn a man to die without a hearing, it would be valid. Hallam's Const. Hist. p. 28. Mr. Jefferson urges as an objection to the Constitution of the United States, the want of a Bill of Rights. In a letter to Col. Humphreys, in 1789, he says:

"I am one of those who think it a defect, that the important rights not placed in security by the power of the constitution itself were not explicitly secured by a supplementary declaration. There are rights which it is useless to surrender to the government, and which the governments have yet always been found to invade. These are the rights of thinking and publishing our thoughts by speaking or writing; the right of free commerce; the right of personal freedom."

"We are now allowed to say, such a declaration of rights, as a supplement to the constitution where that is silent, is wanting, to secure us in these points. The general voice has legitimated this objection." Jefferson's Works, vol. 3, p. 13. The States, in their several constitutions, obviated, as to them, the objection. Such a declaration, Mr. Jefferson admitted, would place a check in the hands of the judiciary. 1 Tuck. Life of Jefferson, 281.

Having thus ascertained the intention of the section in question, it is the duty of the court, so far as is consistent with its language, to give effect to it accordingly. The mere demarcation on parchment of the constitutional limits is not a sufficient guard against the encroachments of tyrannical legislation. The early history of Virginia establishes this; and of Pennsylvania. In this latter State, in 1783, and 1784, a council of censors assembled, charged with the duty of inquiring "whether the constitution had been preserved inviolate;" and they reported that it "had been flagrantly violated by the legislature in a variety of important instances." Madison, in Federalist, No. 48. "Liberties are nothing until they have become rights—positive rights, formally recognized and consecrated. Rights, even when recognized, are nothing so long as they are not entrenched within guarantees. And lastly, guarantees are nothing so long as they are not maintained by forces inde-

pendent of them, in the limit of their rights. Convert liberties into rights, surround rights by guarantees, entrust the keeping of these guarantees to forces capable of maintaining them—such are the successive steps in the progress towards a free government." Guizot on Rep. Gov. 302.

"The courts of justice are to be considered the bulwarks of a limited constitution." Federalist No. 68. "The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. Ibid and 2 Lieber, pp. 280, 281, 282.

We come to the conclusion, then, that the courts should declare void a law in violation of this fundamental principle of the constitution, a law in violation of the natural rights of man. To be explicit. The courts cannot annul an act of the legislature simply because it violates the fundamental principles of correct legislation; but because it violates a fundamental principle of the constitution. 2 Lieber, 602; 6 Ind. 87, 88, 96; 1 Kent, 450, note; *Martin ex parte*, 8 Eng. Ark. 198. The act annulled according to the expression always used touching the subject, must be *unconstitutional.*

It has been said, indeed, by high authority that "there are certain absolute rights and the right of property among them, which, in all free governments, must of necessity be protected from legislative interference, irrespective of constitutional checks and guards." 7 Blackf. 477. And the dictum is supported by eminent jurists and writers of celebrity. American Law Magazine, vol. 1, p. 319 (1843) and the cases there cited. Junius, vol. 1, p. 88, in dedication.

But this doctrine would not be admitted in the English courts where there is no written constitution, and cannot arise here, because, as we have seen, our constitution does protect these natural rights.

Again, it is sometimes said the courts may pronounce an act void because not properly within the scope of legislative power; but this is also by virtue of the constitution; for that instrument ex-

pressly declares that the powers of government shall be divided between three departments, the legislative being one, and it expressly inhibits either from acting out of its assigned sphere; art. 3; hence, the constitution, in fact, prohibits the passage of any act by the legislature not properly within the scope of legislation.

We here take leave of this topic, remarking that as our system of polity was framed by politicians—using the word as a synonym of statesmen, not of politicasters—we have necessarily been led, in construing it, to study and cite the opinions of that class during the period of its formation. The review has considerably extended this opinion; and the propriety of the course is justified in the language of a section of the first constitution of Ohio, art. 8, sec. 18, "That a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty."

And per Mackintosh supra, "Perhaps the only expedient that can be devised by human wisdom to keep alive public vigilance against the usurpation of partial interests, is that of perpetually presenting the general right and the general interest to the public eye."

If it be said that the principles asserted will sometimes thwart the will of a majority, we answer, it is admitted; but what then? Ours is not, as were, to some extent, the ancient republics, a government directly of masses and majorities, but is

1. A government by representatives.
2. With limited powers.
3. With those powers divided among departments.
4. With one department having the ultimate right to decide upon the respective powers of all, and to annul action beyond the limits of those powers. It is, in short a government within a constitution. The majority, here, cannot do everything, much less, a plurality which elects our legislature. The majority rules when all act within the limits of the constitution. If a majority or plurality may do what it pleases, and this is to be the rule without limitation, the constitution should be at once abrogated, and leave us a legislature as omnipotent as the British parliament. Till this is done we must uphold the restraints of the constitution, wisely imposed by

the people themselves, upon the action of majorities and the usurpations of the legislature. Minorities, here, have some rights as against majorities, and all have some security from legislative tyranny. In the restraints of the constitution lie the liberties of the people. If it be said we thus deprive the legislature, to some extent, of power to do good, we admit it; but we also deprive it of power to do evil. Unlimited power in mortal hands is always abused. We only attempt to confine that of the legislature within the limits the people, by their fundamental law, assigned to it—limits fixed after probabilities of good and of evil had been weighed and balanced; and if those limits are unsatisfactory, the fault is of the constitution not of us. It should ever be remembered that ours is a government that seeks to reconcile public order with private right and individual liberty. And if it is found that this cannot be done to perfection, it is to be considered in reference to the ordaining of a new constitution, whether any, and if so, how much of individual excess is to be tolerated as a lesser evil than the subjection of the people to despotic power. See Lieber on Liberty and Self-Government, passim. "Tyranny and mere tranquility," says Lieber in his Political Ethics, vol. 2, pp. 4, 6, "are things for which men may be trained, into which they may be forced. There are no more quiet and peaceable people on earth than the Chinese." They have a saying: "Better a dog in peace than a man in anarchy." "Rather however," says Lieber, "all the disturbance of the West, so that it be a fermentation which promises a better, purer State, than Chinese peace and stagnation." See on this point *Herman* vs. *The State*, 4 Am. L. Reg. 344.

The natural rights of which we have spoken, let it be observed, are not rights of vagrancy; but they inhere in man as a necessity of his nature; they belong to him because he is a man, and because he would not exist as such without their exercise. Life was the gift of his Creator, but life is not in man, self-sustaining; it must be prolonged by nourishment and protection of the body. Hence, man must have food and clothing. The demand of nature is absolute. God has given the earth and the abundance thereof whereby to supply this necessity; and limbs, and intellect, ingenuity, by the

use of which, food and raiment, property, may be obtained, upon and out of this earth and in no other manner — these are the gifts and necessities of nature, and belong to man as man. God has also made man a moral being accountable directly to Him in respect to their mutual relations. Hence, no human authority can step between this accountability and man's Maker, and final Judge; and, hence, man's natural, necessary right; duty, even, to worship his Maker in such a manner as he will be willing to be accountable for. The race of man is perpetuated by a communion of the sexes, and parental care of offspring. The sexes are about equal in number. Every man, therefore, has the natural right to one wife and no more— monogamy is the law of nature. We thus discover that the idea of unlimited sovereignty in one man or any number of men over another is unjust, unreasonable, violative of his moral nature, unwarrantable tyranny. In this manner are man's natural rights ascertained, defined, limited, rendered as certain as any other facts. As to some of them most publicists are now agreed. Others are to be determined. As enumerated by Lieber, in his work on Political Ethics, these rights are substantially: 1, Life; 2, Personal Liberty; 3, Free Agency; 4, Resistance to oppression; 5, Trial by law before Condemnation; 6, Right of Utterance, Communion, Speaking and Writing; 7, Reputation; 8, Security of Person, Family, &c.; 9, Freedom of Conscience, Worship, &c.; 10, Property, including Commerce. Traffic, he insists, "is a necessary right, exercised, according to history, from the origin of society, growing indispensably out of the necessary division of labor." Exchange is one of the most lawful, necessary and natural means of acquisition, founded in the variety of soil, clime, genius of people, agents of nature, &c. and one of the first and most effective means of civilization. Exchange lies in the great order of things;" (see also, 1st vol. Tucker's Life of Jefferson, pp. 58, 59,) and would alone warrant another primordial right, viz; 11, That of locomotion, going where one desires. Vol. 1, p. 192, et seq. of Lieber.

But notwithstanding the legislature cannot prohibit, it may regulate the exercise of natural rights, and all pursuits and practices of its citizens. We do not propose to elaborate this branch of the

subject at length, but lay down the following propositions as expressing the result of our reflections upon it.

1. No man has a right to pursue a business or practice *malum in se*, entirely evil in itself. Example: The manufacture and sale of counterfeiting apparatus and counterfeit money. These articles are not and cannot be supplied to the public to meet any want, or for any useful purpose. They are made with the sole intent of cheating and defrauding. So the practices of gaming, drawing lotteries, &c., are no reasonable modes of exchange on equivalent considerations, but tricks to cheat the unwary.

2. The legislature may prohibit such pursuits and practices.

3. Every man has a right to pursue any and every business or practice not evil in itself, which the wants, appetites, fashions, and follies even, of community invite to. Lieber, vol. 1, pp. 159, 160. And,

4. The legislature cannot absolutely prohibit such pursuits. This must be admitted or it must be admitted that all pursuits are at the sufferance of the legislature—the doctrine in England, where there is no constitution, and of a late case in Delaware, *The State* vs. *Allmond*, which ignores the bill of rights and constitution of that State, following as it does, to the fullest extent, Blackstone's idea of liberty under the British government. A. L. Register, vol. 4, p. 533. But,

5. No man in the prosecution of his lawful business or practice has a right intentionally or carelessly to annoy or injure another. And, hence,

6. The legislature has a right to establish reasonable regulations in relation to such business or practice calculated to prevent the occurrence of such injury. The exercise of this right is analagous to requiring security for good behavior, keeping the peace.

These regulations may relate:

1. To time. Examples: Preventing railroad trains, coming from any infected point, entering any other inhabited place—preventing the running of trains on Sunday, &c.—suspending the exercise of any and every right during temporary emergencies in war and rebellion, as in the case of the writ of habeas corpus.

2. To place. Examples: Auction sales under the windows of a church in time of service. Sales of liquor near the grounds of a camp meeting — offensive trades, such as slaughtering establishments, &c., in cities, &c., and storing, and building of, combustible materials where they would endanger the security of life and property of others, without fault on their part.

We say without fault on their part, for it is a well settled principle of common and maritime law that a person cannot complain of an injury that his own fault inflicts. And with a poor grace would it be asked that the running of locomotives and cars should be entirely prohibited because some persons might be foolish enough to place themselves upon the road track and be run over; or that the use of ropes should be prohibited because hypochondriacs and those disappointed in business or love, might occasionally hang themselves by them.

3. To manner, occasion, &c. Rapid driving through the streets of a crowded city—sales or gifts knowingly made of dangerous articles, to lunatics, drunken men, idiots, minors, &c., being persons incompetent to properly use them, and likely to use them to others' injury.

Says Lieber, Pol. Eth. vol. 1, p. 200:

"It is not said that utterance, though necessary for me in my character of man, may not be regulated or suspended. Though I have as man the indisputable right of utterance, I have not the right to use it everywhere and on all occasions. So does my right of locomotion not entitle me to go where I choose, into my neighbor's field, closet, &c. I am not allowed to speak loud in church, in a deliberative assembly."

Usury laws are another instance of regulation. "But all these are exceptions, as by way of exception, the police may examine my rooms, whether I ventilate them properly in times of a general infection." Lieber. Generally, in these cases, it is for the judiciary, in the last resort, to judge of the consistency of regulations made by the State or cities with the constitutional rights of the citizens. Trades and practices must be tolerated so far as they are properly used; they may be restrained at the point where they

begin to be abused. Public policy encourages trade, and incites to inventions, leading to new pursuits, by rewarding the successful. Contracts in general restraint of trade are void at common law, as are contracts in full restraint of marriage, though partial and reasonable restraints in relation to both subjects are valid. *Beard et al.* vs. *Denis*, 6 Ind. 200. A contract not to marry a particular person is good, but a contract not to marry at all is void. Chit. Cont. 671. "Marriage, no doubt may be made the subject of regulation by qualified restrictions, under certain circumstances, but under no circumstances whatever ought a general and entire restriction of it to be countenanced and sanctioned by law." *Middleton* vs. *Rice*, 6 Pa. L. Journ. 240. Quoted on p. 399, (top paging,) of Williams on Personal Property.

By-laws of cities in restraint of trade, are, when unreasonable, void. Ang. and Am. on Corp. p. 277. In the light of these considerations and established principles, we think the legislature had a right to prescribe the condition or regulation, as enacted, that railroads shall fence, or pay for the stock they injure. We cannot say judicially that is not a reasonable regulation, necessary to prevent their injuring others, without such others' fault.

4. The third section, so far as it inflicts a penalty, for appealing and failing to reduce the judgment 20 per cent. is, in our opinion, unconstitutional and void.

A law may be constitutional in part and unconstitutional in part. This third section relates to the practice of the law in these cases. The trial and rendition of judgment are a part of the practice in a cause. The section is special. Laws are general or special. This is the first great division. Special laws are again divided into local, personal, particular, &c. See Smith's Com. p. 419. A special act concerns "the particular interest or benefit of certain individuals, or of particular classes of men." See 1 Kent, 459. A law may be "partly public and partly private."

The principle of this act is entirely different from the principle of those general laws fixing the jurisdiction of the several courts. The jurisdiction of the court of the justice of the peace is limited by them in respect to amount. But within that limit it operates alike

upon all. So as to that of the Common Pleas and of the Supreme Court. There may, however, be unconstitutional sections in those acts. As to this we are not now called upon to speak.

The section then under consideration being special, and upon the practice of the law, is prohibited by that clause of section 22, art. 4, of the constitution, which provides that no such act shall be passed, "regulating the practice in courts of justice."

5. The first section of the act is also void, so far as it gives, as to amount, unlimited jurisdiction to justices of the peace. In that particular it is special, and in conflict with that clause of the section of the constitution just cited which prohibits special laws; "regulating the jurisdiction and duties of justices of the peace and of constables."

This point, however, does not affect the present case. The judgment is reversed, with costs, and the cause remanded for trial and judgment according to the course of the general law of the State.

In the Supreme Court of Chittenden (Vt.) County, 1855.

DAVIES & AUBIN *vs.* JOHN BRADLEY & CO.

Where a shipper consigns goods to a factor and endorses and sends forward bills of lading for them, and upon the faith of such bills of lading the factor makes advances. *Held*, that the facts constituted such a symbolical delivery of the goods to the factor or consignee as to amount to a constructive possession, and that the factor's lien attached.

The opinion of the court was delivered by

REDFIELD, Ch. J.—The question in the present case is in regard to the right of a factor to a lien upon goods consigned to him and upon which he has made advances. Ashurst, J. in giving the opinion of the court in *Lickbarrow* vs. *Mason*, 1 H. B. 357; 2 T.

R. 63; 6 East, 21, a very leading case upon this subject, says, in regard to a bill of lading, "If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendor only, but he has made it an endorsable instrument. The judge seems to consider the fact that the bill is made to deliver to assigns, essential to its validity, in the hands of a bona fide purchaser of the goods. 3 B. & Al. 282; 1 Ld. Raym. 271. And in Chitty upon Contracts it is said, p. 485, "if the bill of lading be to deliver to A, he should be plaintiff. The bill of lading will decide who shall sue the carrier, citing *Bryans* vs. *Nix*, 4 M. & W. 775. The form of expression used by Mr. Chitty, as indicating who is to bring the suit, upon the face of the contract of consignment, or receipt by the carrier, is the very identical language of two of these receipts. "June 13, 1848. Received of B. & H. Boynton, twenty-two bales of wool, *to be forwarded to Davies & Aubin.*" The one of May 30, is "*to forward Davies & Aubin*," and that of the 15th June. is, "Received in store, &c. of B. & H. B., for Davies and Aubin," which is still more explicit, if possible. In the case of *Bryans* vs. *Nix*, the paper called indifferently a shipping receipt, and a bill of lading, was not made to assigns, but only to the plaintiffs, and the effective part of the contract was to be delivered to Delany & Co. at Dublin, in care for and to be shipped to the plaintiffs in the action, which is certainly no more express in its undertaking to forward the goods to plaintiffs, than the contract of defendants in the present case. In either case it is an express promise to deliver to the consignees. It can, by no kind of refinement, be made to signify anything else. And according to all the cases, if the plaintiffs had been purchasers, this would have vested the absolute title in them, subject only to the right to stop *in transitu*, which right might have been defeated, by a bona fide transfer of the bill of lading for value. In *Hall* vs. *Griffin*, 10 Bing. 246, it was held, that the transfer of a wharfinger's receipt was a transfer of the property. And Tindale, Ch. J. said, "it had been the practice to consider money advanced, upon a wharfinger's receipt, in the same light as if advanced on the actual delivery of goods." And the holder of a lighterman's receipt is said to have a

control over the goods till he can obtain a bill of lading. *Craven* vs. *Ryder*, 6 Taunton, 433.

As contended by counsel in the case of *Bryans* vs. *Nix*, the contract was destitute of almost all the essentials of a bill of lading. It was no voyage at all, but a mere transfer along a canal boat to Dublin, and from thence to Liverpool. But the court held that the consignees acquired a sufficient title to all the cargo which was actually put on board the boat by the consignors, before the shipping receipt was executed, and forwarded to the plaintiffs, but not to such, as was then under their control and not shipped, so that the mere promise to ship certain articles set apart, would not be sufficient, but it must actually be done, and the shipper's receipts according to most of the cases forwarded and the bill accepted, or advances made upon the faith of such shipment, before any new destination is given to the cargo. Until that is done the matter is ambulatory, and dependent upon the will of the consignor. But afterwards, it is beyond recall. In that case the consignor altered his mind before the second boat was landed and gave an order to the shipper to have its cargo delivered to another person, as also the first. And the court held, that the first was beyond his control and not the second, because the order was countermanded before it was shipped.

It seems impossible to distinguish the present case, in principle, from the case of *Bryans* vs. *Nix*. There are many cases where a symbolical meaning of goods with an advance, or acceptance upon the faith of the delivery of such symbol, has been held to create a lien upon the goods, the same as the actual delivery. In *Hall* vs. *Griffin*, 10 Bing. 246, before referred to, one Willson was the owner of goods, which were about to be shipped from Stockton to London and took a wharfinger's receipt for them, which he handed over to plaintiff upon an advance of money. The plaintiff showed this wharfinger's receipt to the wharfinger at London before the goods arrived, and he promised when they did arrive to deliver them to plaintiff. And the court held, that the plaintiff acquired such an interest in the goods, as will enable him to maintain trover. This is put by the court upon the ground, that it is a symbolical

delivery of the goods, the same says Bosanquet, J., as if the goods passed from hand to hand.

In the case of *Craven* vs. *Ryder*, 6 Taunton, 433, the plaintiffs contracted to sell sugars to one French, and put them on board the ship for that purpose, but took a lighterman's receipt for them as shipped "for and on account of the plaintiffs" and although the master gave a bill of lading, certifying that the goods were shipped for French, or his assigns, it was held, that he did this in his own wrong until the lighterman's receipt is surrendered. That was the contract of consignment, until exchanged for the bill of lading.

So that to give a factor a lien upon goods consigned, but not actually received, these incidents must concur. 1. The consignment must be in terms to the factor. That was so in the present case, as much as if a formal bill of lading had been made in his name, omitting assigns. So that the undertaking of Bradley & Co. is in terms, to forward them to Davies & Aubin, and for their benefit. They are upon the face of the forwarder's receipt, (which is in fact a bill of lading, as far as one can properly exist in these inland transactions,) the party entitled to sue, and the instrument binds the defendants to forward the goods to the plaintiffs, and equally binds the carrier, to deliver to them, and *prima facie* the plaintiffs are the only party entitled to receive the goods, upon the face of the transaction. B. & H. Boynton had parted with their control over them. 2. But to the conclusiveness of such a contract against creditors and subsequent purchasers, it is requisite that the consignee should have made advances or acceptances, upon the faith of these particular consignments. That, too, we think is shown by the testimony, and found by the jury.

In addition to this, which seems commonly sufficient to give the factor a lien, and is all that existed in *Holbrook* vs. *Wight*, 24 Wendell, 169, and which seems to us to be a sensible, and we see no reason to doubt, a sound case. In addition to all this, the present case does contain what all the cases and all the books upon this subject, as far as I can learn, have ever regarded as a symbolical delivery of the goods, the sending to plaintiffs the shipper's receipt, which is in effect and in terms, a consignment, or bill of lading to

the plaintiffs. For what is a bill of lading? It seems to be nothing more than an acknowledgment that the goods are put on board the ship, at one port, to be delivered to A. B. at another port, or to his assigns. This contract is commonly executed in triplicates, one of which is kept by the master for his own information, as to the nature of his undertaking, one is retained by the consignor, to show that he has shipped the goods, the other, which is the only one intended to be negotiated, is forwarded to the vendee or factor, and if these persons endorse such bill of lading, for value, it passes the title of the goods even to the defeating of the right to stop *in transitu*. The consignor may, if he choose, take the bill of lading in his own name, and then he can endorse it. But, unless he restricts the consignment to be delivered for his own use, the consignee is the party *prima facie* entitled to control the delivery, and the title. And this is the form of the present consignment. And the shipper's receipt, being delivered to plaintiff, and acceptances made upon its faith, the plaintiffs title was perfected to the extent of his lien, and this point is expressly put to the jury and found.

This point was considered and decided by the court when the case was last before us, and is repeated in 24 Vt., 55, and the re-argument and re-examination has confirmed our convictions of the entire soundness of the decision. We do not think the question is one susceptible of reasonable doubt, and it seems to us to have been properly submitted to the jury, so that we might here content ourselves by affirming the judgment; but we are induced to examine the cases further to some extent.

The case of *Holbrook* vs. *Wight*, 24 Wendell, 168, is a full authority for the decision of the county court in this case. There the plaintiffs were commission merchants in New York, and their correspondents manufacturers, at Middlebury, Vermont. They advised the plaintiffs of the goods being in readiness to be forwarded to them, and that they would be sent to a house in Troy, as soon as consistently could be, to be forwarded to plaintiffs in the spring. That was done, and the goods sent to a forwarding house in Troy, with instructions to forward them to plaintiffs upon the opening of navigation. The consignors, about this time, drew upon the plain-

tiffs for $6,000, at different dates, which the jury found, as they did in the present case, the plaintiffs accepted, relying upon these consignments. The consignors, being pressed by other creditors, made a different disposition of the goods, while remaining in the hands of the forwarder, at Troy, and ordered them into other hands, and to be delivered to other parties. But the court held that the lien of the first consignees was perfected, and the subsequent disposition of the property could not defeat their rights. In this case there was nothing like a symbolical delivery which does exist in most of the English cases upon this point, and equally in the present case, and which seems to be regarded by most jurists and merchants, as an essential element in a consignment to a factor, in order to perfect his lien for advances made upon the faith of such consignment, and which fact is regarded as amounting, in all cases, to a substantial change both of title and possession. The case of *Taylor* vs. *Kymer*, 3 B. & Ad. 320, is a very elaborate and well considered case, where this distinction is fully recognized. It may be here noticed that some of the English cases treat a formal bill of lading as strictly negotiable, notwithstanding the omision of the word assigns. *Renteria* vs. *Reuding*, 1 M. & M. 511. But no question of that kind arises in the present case, see 1 Smith's Leading Cases, 260, note to *Miller* vs. *Race*, where the proposition is attempted to be maintained that no instrument, by the English common law, is strictly negotiable, unless in terms made to assigns, or order, or bearer, &c., that is, unless its negotiable quality appears, in terms, upon the face of the instrument. None of the principles laid down in the case of *The Frances*, 8 Cranch, 335 *et seq.* have much application to this subject, as the questions there discussed, have reference to prize cases, nor does any general principle there laid down, conflict at all with our decision here. *Mitchell* vs. *Ede*, 39 Eng. Com. L. 260, 11 Ad. & Ellis, 888, is decided chiefly upon the question of the intention to consign the particular goods, and the effect of endorsing a bill of lading, as passing the absolute title, and so far as the symbolical delivery is concerned, is an authority for our present decision. In the case of *Elliott & Boynton* vs. the defendants, 23 Vt. 217, there was no advance or acceptance upon the faith of any particular con-

signment, and nothing like a symbolical delivery, which leaves the case wholly dissimilar to the present. No shipping list or receipt was ever delivered to the plaintiffs in that case, by any one. The case of *Whitehead* vs. *Anderson*, 9 M. & W. 534, where it is held that to constitute a constructive possession in the consignee, the forwarder or carrier must enter into some new and specific contract to deliver to the consignee, is this very case, as we understand the shipper's undertaking. The case of *Gardner* vs. *Howland*, 2 Pick. 599, seems to us a full authority for the decision we here make. Here, the delivery of the invoice with an assignment, is regarded as a symbolical delivery of the ship. Without speaking in detail of the other cases, which seem to us more remote from the very points involved in this case, we conclude by saying that no case, and, so far as we can perceive, no principle conflicts with the plaintiffs' right to recover.

It is scarcely needful to advert to any criticisms which were attempted at the bar, upon the opinion of the court, in the 24th of Vt. in the same case. We have shown that the decision is sound and tenable, we think, and if it were not, it must, according to the settled practice of this court, govern the same case; but we do not consider the opinion of the court, as there reported, is fairly open to the objection, that it is extra-judicial, and mere *obiter dictum*, because the judge does not confine his argument to the single point urged by counsel. That might have been sufficient, but it was by no means so entirely free from all cavil, as the reason urged by the learned judge, which so far from being his own individual speculation, was the very ground, and the chief ground upon which the case was rested by the different members of the court at the consultation, and it is too well and too convincingly stated, to require any attempt at support or commendation from me.

Judgment affirmed.

In the Supreme Court of Chittenden (Vt.) County, December, 1856.

WILLIAM P. BRIGGS *vs.* S. W. TAYLOR.

1. Negligenc is a mixed question of law and fact.
2. A judge is not bound to submit to a jury questions of fact which uniformly result from the course of nature; this uniformity of nature becomes a rule of law.
3. Meaning of the phrases, "ordinary care" and "gross negligence." Authorities cities and discussed.
4. Any injury to property in custody of an officer under attachment, caused by his apparent negligence or want of care, renders him prima facie liable, and imposes upon him the burden of showing a valid excuse.

The opinion of the court was delivered by

REDFIELD, Ch. J.—I. In regard to the carriage, and the wagons and sled, which were not past use, although the carriage was an old one, and the wagons and sled were described by the witnesses, as being "not very new nor very old," it seems to us there was no testimony in the case tending to show that an officer who held them under attachment, would be fully justified in letting them stand out-doors all winter. We could scarcely conceive of a State officer justifying such a course, short of absolute necessity, which it would seem would never occur when boards could be obtained. And where there is no testimony, tending to excuse an officer in such case, it becomes a mere question of damages. Questions of negligence are said in the books to be mixed questions of law and fact, but where there is no testimony tending to show negligence, or where a given course of conduct is admitted, which results in detriment, and no excuse is given, the liability follows, as matter of law, and there is nothing but a question of damages for the jury.

We do not think a judge is ever bound to submit to a jury questions of fact, resulting uniformly and inevitably, from the course of nature, as that such carriages will be injured more or less by exposure to the weather during the whole winter, or that a judge is bound to submit to a jury the propriety of such a course, when it is perfectly notorious that all prudent men conduct their own affairs differently. This uniformity of the course of nature or the conduct of business, becomes a rule of law. But while there is any uncer-

tainty, it remains matter of fact, for the consideration of a jury. It could not be claimed, that it should be submitted to a jury whether cattle should be fed or allowed to drink, or cows be milked.

II. As from the determination of the first point, a new trial becomes necessary, it will be of some importance to inquire, in regard to the proper mode of defining the duty of the officer in keeping goods, attached on mesne process. It is usually defined in practice, in this State, certainly so far as we know, much as it was in this case, by the use of the terms, "ordinary and common" care diligence, and prudence. And it is probable enough, these terms might not always mislead a jury. But it seems to us, they are somewhat calculated to do so. If the object be to express the medium of care and prudence among men, it is certain these terms do not signify a fixed quality of mediocrity even. For if so, they would not be susceptible of the degrees of comparison, as more ordinary and most ordinary, which medium, and middle, and mean, are not. The truth is, that ordinary and middling and mediocrity even, when applied to character, do import, to the mass of men, certainly, a very subordinate quality or degree. Something quite below that which we desire in an agent or servant, and which we have the right to require in a public servant, especially. A man who is said to be middling careful or ordinarily careful, is understood to be careless and is sure never to be trusted.

We have been at some pains to look into the English books upon this point, and although there may be some exceptions, the general rule certainly is, among the English judges, to express common care and ordinary care, by terms less liable to misconstruction, and as we think, likely to be more justly appreciated by juries. In *Duff* vs. *Budd*, 3 Brod. & Bing. 177, the rule is laid down by Dallas, Ch. J. to the jury, in these words: "Gross negligence is where the defendant or his servants had not taken the same care of the property as a *prudent man would have taken of his own*," and the judgment is affirmed by the full bench. In *Riley* vs. *Horne*, 5 Bing. 217, Best, Ch. J. says of a carrier, "the notice will protect him, unless the jury think that *no prudent person*, having the care of an important concern of his own, would have conducted

himself with so much inattention, or want of prudence." In *Batson* vs. *Donovan*, 4 Barn. & Ald. 32, the same learned judge lays down the rule thus: "They must take the same care of it that a *prudent man* does of his own property. This is the law with respect to all bailees for hire or reward." In *Wyld* vs. *Pickford*, 8 M. & W. 443, Parke, B. seems to claim a distinction between gross negligence and ordinary neglect, but admits ordinary neglect may be correctly defined in the above cases. But in *Hunter* vs. *Debbin*, 2 Queen's B. 644, Denman, Ch. J. said in regard to gross negligence, "it might have been reasonably expected that something like a definite meaning should have been given to the expression," "in none of the numerous cases referred to on the subject is any such attempt made, and it may well be doubted whether between 'gross negligence,' and negligence merely, any intelligible distinction exists." But the English cases all seem to agree in defining ordinary negligence as that which a *prudent man* does not allow in the conduct of his own affairs, and most of the later cases, where the question has arisen, both English and American, repudiate the old attempt to distinguish three distinct degrees of diligence and the cumulative degrees of negligence. In *Wilson* vs. *Brett*, 11 M. & W. 113, Baron Rolfe makes some very pertinent remarks upon this subject. "I said I could see no difference between *negligence* and *gross* negligence, that it was the same thing, with the addition of a vituperative epithet." And in *Austin* vs. *The Manchester R. R.* 11 Eng. L. & Eq. 513, Cresswell, J. refers to the language of Lord Denman quoted above, with approbation, and in the *Steamboat New World* vs. *King*, 16 Howard U. S. 474, Mr. Justice Curtis seems to adopt a similar view in rgard to these distinctions being more or less unintelligible, and in practice often leading to misconstruction and misunderstanding. It seems too that these distinctions are repudiated by many of the continental jurists in Europe, as producing more uncertainty than they need, 6 Toullier's Droit Civile, 239, 11 id, 203, and although it seems we have adopted these distinctions in the degrees of diligence and negligence from the Roman civil law, I do not find the commentators on that law adopting our loose manner of expressing what is required of a bailee for hire. Domat,

part 1, book 1, tit. IV, sec. VIII, art. III, thus expresses the care of such bailees: "He who undertakes to keep cattle, ought to preserve that which is entrusted with all the care that is possible to be taken by persons who are the most watchful and diligent." And this is really synonymous with the rule adopted by the English courts. Mr. Justice Story, Bailments, § 11, in order to mention the old definition of three grades of diligence, defines it much in the manner it was done in the present case. "Common or ordinary diligence is that degree of diligence which men in general exert in respect to their own concerns," which certainly leaves upon the mind a different impression from the definition of Domat and the English judges, and we cannot but regard it as one calculated to mislead juries; and this very writer, in § 13, adopts the diligence of "prudent men," as the measure of common diligence, and it seems to us nothing short of this will do justice in a case like the present.

It may with some plausibility be said, that one who employs a man known to the employer to be habitually indifferent to the management of his own concerns, has no right to expect him, all at once, even for reward, to assume a wholly different character, and the jury would be likely so to decide, the question being ordinarily one of fact, when the testimony raises any doubt; and when one employs a man of skill and talent in the management of his own affairs, he may justly expect him to exert the same skill and talent, to the same extent in the management of the business which he undertakes for others; and in the case of a public officer who is selected for his fitness for the particular trust, every one may justly expect all the care and diligence, which men entirely competent and careful could reasonably be expected to exert in their own business of equal importance.

The absurdity of this measure of duty in a public officer will become sufficiently obvious, if we advert to the form of the oath or of the official bond of public officers; what should we think of having one sworn or giving bond to perform his duty as common men ordinarily do such things. This certainly sounds very different from the official oath, "that you will faithfully execute the office to the

best of your judgment and ability," and an official bond obliges officers to the strictest, most faithful performance of all their duties. Any other standard would sound absurd, and it is obvious to us, that the case of *Bridges* vs. *Perry*, 14 Vt. 262, was not intended to introduce any different rule of liability upon officers in keeping property, as said in Drake on Att. § 273, "The officer must comply with all the requisitions of the law," (one of which is, to keep safely, property attached on mesne process, and restore it when required by law,) "or show some legal excuse for not doing so." Hence in *Sewall* vs. *Marston*, 9 Mass. 530, an officer was held bound on mesne process, five years before, ready for sale on the execution, and in *Tyler* vs. *Ulmer*, 12 Mass. 163, it was held, an officer could not in such case excuse himself for not producing cattle, by showing that from the scarcity of fodder they could not have been kept alive.

Any injury or loss in such cases, renders the officer *prima facie* liable, and imposes upon him the burden of showing some valid excuse. *Logan* vs. *Matthews*, 6 Barr, 417, Story on Bail. § 411. *Platt* vs. *Hubbard*, 7 Conn. 501, *Burt* vs. *Millar*, 13 Barbour, 482. There is undoubtedly some contradiction in the cases, in regard to the burden of proof of negligence in the ordinary care of bailments for hire, but there can be no doubt, we think, in regard to the question in the present case. This is expressly so laid down in *Bridges* vs. *Perry*. The court in that case, as will be obvious from a careful examination, had no purpose of excusing this class of officers from any degree of care and diligence, which careful men would expect under the circumstances.

And this, it seems to us, is the true measure of liability in all cases of bailment. The bailee is bound to that degree of diligence, which the manner and the nature of his employment makes it reasonable to expect of him; any thing less than this is culpable in him, and renders him liable. The conduct of men in general in the region where the attachment was made, may be some guide to what ought to be required of the defendant in keeping property attached. Men, of course, prudent and careful men, for no one is expected to go very essentially beyond the common custom of the country

in such matters, as it must be attended with extraordinary expense and a question might thereby arise as to the propriety of incurring such expense.

Judgment reversed, and case remanded.

In the Supreme Court of Pennsylvania, January 1857.

SUNBURY AND ERIE RAILROAD COMPANY *vs.* HUMMEL.

1. The liability of Railroad Companies for damage caused by fire through the negligent management of their engines, is settled at common law. But,
2. They cannot be called upon to make compensation in advance for the risk of fires not included within the common law rule, and no such considerations can operate upon the viewers in fixing the amount of damages to be awarded to the land-owner.
3. The Legislature, in requiring the viewers to take into consideration the advantages and disadvantages resulting from any public improvement, as a railroad, did not authorize them to enter into remote and contingent future and speculative damage; full compensation according to the best estimates that can be obtained, would seem to be the true rule.

The majority opinion of the court was delivered by

LOWRIE, J.—Railroad companies are liable at common law for the damages done by fire occasioned by the negligent management of their locomotive engines; and therefore it is plain that for the risk of such damage, no compensation can be allowed at the taking of the land for the construction of the road, 23 State R. 373. Must they make compensation in advance for the risk of fires not covered by this rule. The charter of this company does not expressly say that they must; and therefore we must inquire what may reasonably be presumed to have been the intention of the legislature when they granted the charter. To aid us in this, it is proper to refer to what the legislature have usually done in such cases. In no charter that we know of have they ever in terms provided for such compensation, and the State did not allow it when it constructed the railroads from Philadelphia to Columbia, and from Hollidaysburg to Johnstown. And in making the State canals and authorizing other navigation improvements, the corresponding risk of dams

giving way, without negligence, has, in no instance, been declared to be a subject of preliminary compensation. And yet no one can examine our laws providing for public improvements, by the State or by companies, by means of canals, railroads, plankroads, turnpike roads and slackwater, without seeing that in such cases the legislature have in almost every instance intended to provide compensation for every injury that is usually recognized as such by the common law if committed by a private individual. An oversight in this regard in the charter of the Monongahela Navigation Company, was corrected by statute. Such has been our legislative practice.

How do we find the judicial practice here and elsewhere? As a general rule, not otherwise. The courts have regarded the special remedies provided in such cases, as intended to cover all common law injuries and no more, unless the contrary appears. 4 Rawle, 23; 16 State R. 193; 19 id. 15; 2 Watts, 418; 6 M. & W. 705. But this does not include remote, contingent and speculative damages which are not susceptible of definition or proximity chargeable to the work done; as by changing the use of a street by laying a railroad track upon it; (6 Whart. 45) or if the damage depend on accidental circumstances existing at the time; (id. 115) or for profits which might have been made; (7 Serg. & R. 422; 5 Ad. & E. 163) or for affecting a public right of fishing; (14 Serg. & R. 83) or such like cases; (8 State R. 56; 17 Pick. 284.)

And such is in fact the principle of the *Monongahela Navigation Company* vs. *Coons*, 6 Watts & S. 101, not that consequential damages are not recoverable in such cases unless expressly provided for, but that the damage sued for was not an injury at common law. It decides that if one has a mill dam on a navigable river, constructed under a general privilege granted by law, with the condition of not obstructing the navigation, he has no remedy against a company authorized to improve the navigation by dams and locks for injuring his mill-power by raising the water in the river by their dams, unless a remedy be expressly given. And a principal reason for this appears in the argument of the learned Chief Justice pp. 112–114, to show that such a privilege is revocable, and therefore the act complained of is no injury at law. Grant that there is nothing in the constitution that demands that the legislature

should provide for consequential damages, still justice requires it, and it is always done, both for State and company improvements, unless omitted by mistake; for it is not for the purpose of assuring to improvement companies any part of the State's immunity from action, but from the necessity of the case, that special tribunals and modes of trial are provided for such cases. Many cases show that the compensation clauses are entitled to a liberal construction, as remedies for damages sustained, they, under the clause, "interfering in any way with the right of property," damages were allowed against the State for injuring a mill-power in a branch stream. 2 Watts, 418. Under a clause for land damaged or injuriously affected, damages were allowed against a company for lowering a road on which the complainant's land abutted, (2 Queen's B. R. 347) and for obstruction of lights and annoyance by dust and dirt blown from an embankment, (10 Mees. & W. 425) and for affecting the access to a wharf by passing between it and low-water mark without touching it, (6 id. 699.)

And when viewers are required to take into consideration the advantage and disadvantage resulting from an improvement, they are authorized to enter in some measure upon speculative and contingent estimates, unless these advantages consist simply of the conveniences of the road to the owner of the land, and these disadvantages, the inconveniences arising from the mode in which the improvement cuts through his land; and then they could not be speculative or contingent, though the measure of them, in many instances, might be very difficult, in an English case, (*Lee* vs. *Milnor*, 2 Mees. & W. 824,) under a clause authorizing compensation for future temporary or perpetual continuance of recurring damages, it was held that no contingent or imaginary damages, which may never occur at all, could be allowed, and that the cause of the injury that could justify any, must exist in some work of the company from which an injury is certain to accrue, and which furnishes the elements of a calculation. In the charter of this company the compensation to be allowed is for the damage done or likely to be done, or for the damages that have been or may be sustained, taking also into account the advantages and disadvantages, and we

cannot doubt that the compensation intended is to be sufficient to cover all the damages actually sustained by the construction of the road, whether direct or consequential, and without the shield of the State's immunity from action as against any part of it.

The law, therefore, provides for the future damage likely to be done. But this is susceptible of a very obvious explanation, and that is, that the law was providing for an assessment of damages before the work should be constructed, and therefore this form of expression was necessary in providing for any damage direct or consequential; and it does not necessarily imply damage that is speculative and imaginary. And besides, it is a very proper mode of including these permanent and continuing inconveniences that are always apt to follow such improvements, arising from embankments, deep cuts, obstructions of road, &c.

Is it reasonable to infer that remote and contingent future damage, such as accidental fire from locomotives, was intended to be estimated and paid for? We think it is not; we find no act of assembly that indicates that such a thing was ever thought of. The legislature never had any thing like it in its mind when providing for public improvements. The law proclaims its general rule, that it has no remedy for mere accidental injuries; and when providing for the construction of internal improvements, it has uttered no new one. It has given no compensation for the risk of bridges burning or falling back, or toll-houses taking and communicating fire, stationary engines exploding, locomotives running off the track into a man's house, dams and locks giving way and inundating his land, or any thing of that kind. And why should it? If it take a man's land or injuriously affects his property by the improvement, it gives him full compensation according to the best estimate that it is competent to obtain; and why should we have more? True, his risks may be increased by the improvement, but so is it with every man along the road, even though his land be passed without touching it, and why should he be paid for the risk and the other not? In going along streets, the locomotives may pass under the very eaves of a thousand houses, without paying in advance for the risk. The improvement increases the risk, but so does improvement by the

erection of mansions, and especially of all sorts of steam works, but no one gets compensation for such risks. It is a simple law of nature, that he who lives in society must take the risk of those social accidents, which society knows not how to prevent. The incidental hazards must stand as balanced by the incidental benefit of the social state. It is also relevant to this question of reasonableness to ask how the risk is to be measured? There may be but a single shanty on the land of the claimant, and if we are to provide for future risks, the duty is not satisfied by merely ascertaining the risk of the shanty, for there may yet be a hundred houses there; how can it be told how many, or what kind, or value? And who can calculate the chances of accidental fire? We know not yet the kind of fire that may be used; nor the improvements to be made for preventing the emission of sparks, nor how soon there will be another element than fire and steam for locomotive power, nor whether there will be one or one hundred locomotives daily along the road.

These considerations show that an estimate of such a risk for all future time can be founded on no rational principles, and can be formed only by an average of unintelligent guesses. The present case is an illustration of their uncertainty; for the risk of this barn is estimated at half its value, when most likely it could be shown by experience, that not one erection in a thousand along a railroad is burnt in a year. If all houses near to the track of proposed railroads had to be paid for at this rate, no railroads could be made.

It is unreasonable to ask intelligent men to make a sworn estimate of a mere risk which can be founded on no present data, but only on an imaginary future state of things which may never exist, or which may come complicated with other things which may totally change their character, and we are convinced that this law does not intend such an estimate.

We have said nothing as yet of the *Railroad* vs. *Yeiser*, 8 State R. 366, though it is one that has occasioned much of this discussion. We desire to leave that case as little affected by the point here decided as possible, for it does not stand on the very same ground, since there the road was to be made before the damages were assessed, and yet there were to be damages for inconveniences "likely